Supreme Court, U.S.
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No. 06-

IN THE

SUPREME COURT OF THE UNITED STATES

AMBROSE MOSES, III,

PETITIONER,

vs.

STERLING COMMERCE (AMERICA), INC., PAUL L.H. OLSON, THOMAS WILLIAMS, PHYLLIS HOHE, TERRY THOMAS, AND MELISSA COLEMAN,

RESPONDENTS.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

AMBROSE MOSES, III, *Pro Se*
P.O. Box 29250
Columbus, Ohio 43229
614.418-7898
Petitioner

QUESTIONS PRESENTED

The questions presented in this case are of first impression and go to the fundamental authority of a magistrate, as an employee of the court, to exercise judicial duties in an Article III United States District Court when no Article III district judge is assigned to the case.

1. 28 U.S.C. §143 requires that all proceedings be postponed when there is no district judge assigned to a case. District Judge Joseph Kinneary retired from the bench in 2001 and, to date, no district judge has been assigned to this case to replace him. In this case, after Judge Kinneary's retirement, the magistrate conducted proceedings, ruled upon motions, and dismissed the action with no hearing on the merits. With no district judge assigned to the case, was it proper and lawful for the magistrate to conduct proceedings, to rule upon motions, and to dismiss the action?

2. Civil rights actions, such as the Title VII action filed by Petitioner Moses in this case, are litigated in federal court under the jurisdiction of Article III judges. Federal law provides that even when a case is referred to a magistrate by consent of the parties pursuant to 28 U.S.C. §636, the referring Article III district judge remains assigned and continues to exercise supervisory jurisdiction over the case. Is it proper and constitutional for a magistrate to conduct proceedings and dismiss a case when there is no Article III judge assigned to that case?

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Moses v. Sterling Commerce, et al., Case. No. 99-CV-1357, 2003 U.S. Dist. LEXIS 13390 (S.D. Ohio, July 1, 2003), Magistrate's Order dismissing case with no Article III district judge assigned.

Moses v. Sterling Commerce, et al., Case. No. 99-CV-1357 (S.D. Ohio, April 4, 2003), District Judge's Opinion and Order denying motion to vacate the reference to the magistrate and ruling that "the fact that this case lacks an Article III judge is of no significance".

Jurisdictional Statement

August 21, 2006 - Sixth Circuit's Order affirming magistrate's dismissal of case and award of monetary sanctions.

May 5, 2005 - Magistrates Order dismissing case and awarding monetary sanctions.

March 10, 2005 - Sixth Circuit's Order denying Petition for Rehearing *en banc*.

January 3, 2005 - Sixth Circuit's Decision affirming the magistrate's ruling.

July 1, 2003 - Magistrate's Opinion and Order dismissing case.

This petition for certiorari by Moses is filed within ninety (90) days from the date of the Sixth Circuit's Decision and Order affirming Magistrate's order dismissing case and awarding monetary sanctions. The jurisdiction of this court is invoked pursuant to 28 U.S.C. 1254.

Constitutional Provisions and Statutes

The judicial Power of the United States, shall be vested in one Supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish.
U.S. Const., Art. III, Sec. I.

When the office of a district judge becomes vacant, all pending process, pleadings and proceedings shall, when necessary, be continued by the clerk until a judge is appointed or designated to hold such court.
28 U.S.C. § 143.

The court may, for good cause shown on its own motion, or under extraordinary circumstances shown by any party, vacate a reference of a civil matter to a magistrate judge under this subsection.
28 U.S.C. §636(c)(4).

Statement of the Case

This case arises out of a magistrate's usurpation of an Article III district judge's jurisdiction, power, and authority in an employment discrimination case that was filed by the Petitioner Ambrose Moses, III, under Title VII of the Civil Rights Act of 1964, against his employer, Sterling Commerce (America), Inc.

Ambrose Moses, III is an African American attorney who, prior to obtaining employment with Sterling Commerce, worked as a sole practitioner in Columbus, Ohio. After being wrongfully terminated by Sterling Commerce, Moses had financial difficulties and was forced to file bankruptcy. Moses thought long and hard before filing this lawsuit in federal court because, since he was trying to re-build his law practice and career, his reputation as an attorney in the Columbus legal community would be on the line. He went to great lengths to draft a complaint that was detailed and very accurate. Moses had been seriously wronged by Sterling Commerce. The lawsuit had to be filed. If the Constitution, laws, and courts did not work for him, how could he ever, in good conscience, and as an officer of the court, counsel clients that our legal system is one of integrity that truly seeks to do "Equal Justice Under Law".

The case was filed and assigned to Senior District Judge Joseph P. Kinneary. The parties consented to a referral of the case to the magistrate judge. 28 U.S.C. §636(c).

On April 10, 2000, Senior Judge Kinneary issued an Order that "[t]his action is hereby REFERRED to Magistrate Judge Norah McCann King for disposition. 28 U.S.C. §636(c)."

On August 31, 2001, Senior Judge Kinneary retired

from the bench, and later died. The case was not assigned to another Article III district judge.

In November, 2001, Moses wanted to file a §636(c) motion to vacate the reference of the matter to a magistrate judge, but there was no district judge assigned to the case. The Clerk of Court's Office informed Moses that he would need to file a motion to have a judge assigned to the case.

On January 22, 2002, Moses filed a Motion for Assignment of Case to District Court Judge Due to Retirement of the Honorable Joseph P. Kinneary.

On September 17. 2002, nearly nine months later, the Magistrate Judge **denied** Moses' motion to have an Article III district judge assigned to the case and also ordered sanctions against Moses arising from the discovery disputes that have plagued this case since Moses served the first Request for Production of Documents on January 31, 2000.

On September 24, 2002, Moses filed a timely appeal to the United States Court of Appeals for the Sixth Circuit alleging, inter alia, that the magistrate had no jurisdiction to act without an assigned Article III district judge. On December 16, 2002 the appeal was dismissed, sua sponte, for lack of a final appealable order.

On February 25, 2003, Moses filed a motion to have the Chief District Judge assign his case to an Article III District Judge. And, on March 6, 2003 Moses filed a motion to the Chief District Judge to vacate reference to the magistrate. On March 31, 2003, Chief District Judge Rice Ordered the Clerk to assign Moses' case to an Article III District Judge solely for a "limited purpose". On April 4, 2003, **District Judge Sargus issued an Order** denying Moses' motion to vacate the reference **and ruled that "the**

fact that this case lacks an Article III judge is of no significance".

On October 18, 2002, Defendants filed a motion to dismiss with prejudice which was granted by the Magistrate on July 1, 2003. Again, there was no Article III district judge assigned to the case when the Magistrate took this action.

Moses, again, appealed to the Court of Appeals for the Sixth Circuit arguing that the magistrate had no jurisdiction, power, or authority to act without an Article III district judge assigned. The Sixth Circuit affirmed the actions of the Magistrate and sanctioned the ruling that the lack of an Article III judge is of no significance.

On May 5. 2005, the Magistrate granted Sterling Commerce's motion to correct or modify the magistrate's order to include an award of monetary sanctions. Once again, there was no Article III district judge assigned to the case when the Magistrate took this action.

On July 28, 2005, Moses filed another motion to the Chief District Judge for Assignment of Case to a District Court Judge as Required by Article III of the United States Constitution. The Chief Judge of the District Court denied Moses' motion.

Moses, once again, appealed to the Court of Appeals for the Sixth Circuit arguing that the magistrate had no jurisdiction, power, or authority to act without an Article III district judge assigned. The Sixth Circuit affirmed the actions of the Magistrate, including the dismissal of the action and the modification of the previous dismissal entry to now award monetary sanctions.

Moses is petitioning this Court for a Writ of Certiorari 1) to review the lower court rulings, 2) to rule that the actions of the magistrate are void *ab initio,* and 3) to instruct said lower courts to comply with the constitutional requirements of Article III as well as the statutory requirements of 28 U.S.C. §143 and 28 U.S.C. §636(c).

Arguments Supporting Allowance of the Writ

The United States Courts of Appeal for the Sixth Circuit and Ninth Circuit have issued conflicting rulings as to whether the Constitution requires that an Article 111 judge control the interpretation, declaration and application of federal law. In 1984, the United States Court of Appeals for the Ninth Circuit, in the case of *Pacemaker Diag. Clinic of America, Inc. v. Instromedix, Inc.*[1], ruled that "[i]f the essential, constitutional role of the judiciary is to be maintained, **there must be both the appearance and the reality of control by Article III judges over the interpretation, declaration and application of federal law."**[2] In 2006, the Sixth Circuit has ruled that by consenting to have a case heard by a magistrate judge a litigant waives his constitutional right to an Article III judge.[3]

28 U.S.C. §143 requires that all proceedings be postponed when there is no district judge assigned to a case. District Judge Joseph Kinneary retired from the bench in 2001 and, to date, no district judge has been assigned to this case to replace him. In this case, after Judge Kinneary's

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[1] *Pacemaker Diag. Clinic of America, Inc. v. Instromedix, Inc.* (1984), 725 F.2d 537 (9th Cir.), certiorari denied 105 S.Ct. 100, 469 U.S. 824, 83 L.Ed.2d 45.
[2] *Id.* (Emphasis added.)
[3] *Moses v. Sterling Commerce, et al.*, Court of Appeals, Case No. 05-3928 (6th Cir. August 21, 2006).

retirement. the magistrate conducted proceedings, ruled upon motions, and dismissed the action with no hearing on the merits. With no district judge assigned to the case, it was unconstitutional, unlawful, and erroneous for the magistrate to conduct proceedings, to rule upon motions, and to dismiss the action.

Congress intended that civil rights actions, such as the one filed by Moses in this case, are litigated in federal court under the jurisdiction of Article III judges.[4] Federal law provides that even when a case is referred to a magistrate by consent of the parties pursuant to 28 U.S.C. §636(c), the referring district judge remains assigned and continues to exercise supervisory jurisdiction over the case, even with the authority to vacant the reference upon its own finding of good cause. It is unconstitutional for a magistrate to conduct proceedings and dismiss a case when there is no Article III judge assigned to that case.

A magistrate's usurpation of an Article III district judge's jurisdiction, power, and authority is so inconsistent with the fundamental scheme of judicial power set forth by the United States Constitution and is so far departed from the accepted and usual course of judicial proceedings as to call for an exercise of the Supreme Court's supervisory power. This is particularly true when the magistrate, chief district judge, and circuit court panel seem to ignore and attempt to circumvent the clear and unambiguous statutory language of 28 U.S.C. § 143 which states that "[w]hen the office of a district judge becomes vacant, all pending process, pleadings, and proceedings shall, when necessary, be continued by the clerk until a judge is appointed or designated to hold such court." 28 U.S.C. §143.

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[4] *Arbaugh v. Y&H Corporation* (2006), 126 S.Ct. 1235; 163 L.Ed. 2d 1097.

In short, this case was filed and assigned to a district judge. The district judge "referred" the case to a magistrate judge. The district judge retired from the bench. No district judge was assigned to fully replace the retired district judge. The parties had on-going discovery disputes. The magistrate continued to hear motions, to issue rulings, and to conduct proceedings. The magistrate ultimately issued harsh monetary sanctions and dismissed the action without a hearing on the merits.

Pursuant to 28 U.S.C. §143, the magistrate should not have engaged in any of this activity until a district judge was assigned to replace the retired Judge Kinneary.

The United States Constitution and 28 U.S.C. §143 required that a district judge be assigned" to the case, even if the case was "referred" to a magistrate for certain proceedings. Thus, since the Court did not re-assign the case, on January 22, 2002, Moses filed a motion for assignment of the case to a district judge due to the retirement of Senior Judge Kinneary. Strangely, on September 17, 2002, nearly nine months later, the magistrate denied Moses' motion to have an Article III district judge assigned to the case and also ordered monetary sanctions against Moses arising from the discovery disputes that had plagued this case since Moses served the first Request for Production of Documents on January 31, 2000. The magistrate judge's denial of the motion for assignment of an Article III judge was a far departure from the accepted and usual course of judicial proceedings and the requirements of both Article III of the U.S. Constitution and 28 U.S.C. § 143.

Subsequently, on February 25, 2003, Moses filed a motion to have the Chief District Judge assign his case to an Article III district judge. And a few days later, on March 6,

2003, Moses filed a motion to the Chief District .Judge to vacate the reference to the magistrate. On March 31, 2003, Chief District Judge Rice ordered the Clerk to assign Moses' case to an Article III district judge solely for a "limited purpose". On April 4, 2003, District Judge Sargus issued an Order denying Moses' motion to vacate the reference and **ruled that the lack of "an Article III judge is of no significance."**

On appeal, the Court of Appeals for the Sixth Circuit ruled that "it was not error that no district judge was assigned to this case after the retirement of Judge Kinneary." The Court of Appeals further ruled that "[a]lthough not a "district judge", a magistrate judge exercises the same jurisdiction as a district judge where there is a designation pursuant to §636(c)."[5]

Subsequently, the magistrate continued to act without a district judge assigned. On May 5, 2005, the magistrate modified her Order, instructing the Clerk of Courts to enter a dismissal of the action and imposed a harsh monetary sanction against Moses in the modified Order.

On August 21, 2006, the Sixth Circuit again ruled that "[b]y consenting to having his case heard by the magistrate judge, Moses waived his constitutional right to an Article III judge.[6]

This honorable Court has supervisory power to review the issues presented by this case and to provide a clear

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[5] *Moses v. Sterling Commerce, et al.*, Court of Appeals, Case No. 03-4172, 122 Fed. Appx. 177; 2005 U.S. App. LEXIS 19 (6th Cir. Ohio, January 3, 2005).

[6] *Moses v. Sterling Commerce, et al.*, Court of Appeals, Case No. 03-4172, (6th Cir. Ohio, August 21, 2006).

statement of law that cases filed in the district courts pursuant to Title VII of the Civil Rights Act of 1964, as amended, must have an Article III district judge assigned to them, even if the case has been "referred" to a magistrate for certain purposes. Under the United States Constitution and the requirements of 28 U.S.C. §143, a magistrate judge is not equivalent to an Article III district judge. The "civil jurisdiction", power, and authority of a magistrate judge is completely subordinate to the constitutional jurisdiction, power, and authority of an Article III district judge.

All process, pleadings, and proceedings, including the actions and inactions, of the magistrate judge that occurred while there was no district judge assigned to this case should be ruled as void *ab initio*.

Conclusion

For the foregone reasons, the decisions of the lower courts should be REVERSED, that the actions of the magistrate be ruled as void *ab initio,* and that this case should then be REMANDED, assigned to a district judge, and allowed to proceed from that point.

Respectfully submitted,

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APPENDIX

APPENDIX A – OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT DECIDED AUGUST 21, 2006

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

Docket No. 05-3928

AMBROSE MOSES, III,
Plaintiff-Appellant,

v.

STERLING COMMERCE(AMERICA), INC., ET AL.
Defendants-Appellees.

ORDER

BEFORE: MOORE and GIBBONS, Circuit Judges, and EDMUNDS, *District Judge.

Ambrose Moses III, a licensed attorney proceeding pro se, appeals a district court judgment dismissing his civil rights case filed pursuant to Title VII for failure to participate in the discovery process and to comply with the orders of the court and awarding defendants monetary sanctions in the amount of $7,106.25. The panel heard oral argument in this case and concludes that disposition by order is appropriate.

Footnote: - *Hon. Nancy G. Edmunds, Eastern District of

Michigan, sitting by designation.

In 1999. Moses filed a complaint against defendants Sterling Commerce, Incorporated ("Sterling") and five members of the company's management, alleging he was terminated from his position because of his race and his sex and because he engaged in protected conduct. The case was originally assigned to Judge Joseph Kinneary of the Southern District of Ohio, but both parties consented to have a magistrate judge exercise jurisdiction over the action pursuant to 28 U.S.C. §636(c). Although Judge Kinneary retired during the pendency of the instant case, no other district judge was assigned; Magistrate Judge Norah McCann King presided over all proceedings.

Discovery began in early 2000 and proceeded over the next three years. Moses failed to adequately participate in the discovery process. Ultimately, the magistrate judge granted a motion to compel discovery and awarded Sterling $7,106.23 in sanctions. Sterling later filed a motion to dismiss Moses's complaint because of the discovery abuse. The magistrate judge denied the motion but warned Moses that failure to comply would result in the dismissal of his action.

Two years later, Moses had not provided all the discovery ordered by the court to be produced and Sterling once again moved to dismiss Moses's suit with prejudice. The magistrate judge granted Sterling's motion but failed to incorporate the monetary sanctions that had previously been awarded. Sterling filed a motion to correct the judgment to include the earlier award of monetary sanctions. Because Moses had filed an appeal of the magistrate judge's order of dismissal, however, the magistrate judge stayed Sterling's motion to correct the judgment pending the outcome of Moses's appeal to this

court.

On appeal, this court affirmed the dismissal of Moses's case. After a motion by Sterling to lift the stay previously imposed, the magistrate judge issued a final, corrected judgment dismissing the case and ordering Moses to pay Sterling $7,106.35 in sanctions. Moses now appeals to this court.

Moses now argues that it was unconstitutional, pursuant to Article III of the United States Constitution, for the magistrate judge to conduct proceedings, rule upon motions and dismiss an action when no district judge was assigned to the case. Accordingly, Moses alleges that the magistrate judge had no jurisdiction to preside over the case based on 28 U.S.C. § 636(c), because no district judge remained assigned. Moses also asserts that the proceedings were unlawful under [2]8 U.S.C. § 143. Upon review, however, we conclude that Moses's claims are foreclosed by the law of the case doctrine.

"Under the law of the case doctrine, a court is ordinarily precluded from reexamining an issue previously decided by the same court, or a higher court in the same case." *Bowling v. Pfizer, Inc.*, 132 F.3d 1147, 1150 (6th Cir. 1998). A review of the record indicates that, in his prior appeal to this court, we decided the claims that Moses now raises. ***See Moses*** *v. Sterling Commerce(America), Inc.*, 122 Fed. Appx. 177, 180-81 (6th Cir. 2005). Specifically, we stated, "[b]y consenting to having his case heard by the magistrate judge, Moses waived his constitutional right to an Article III judge." *Id.* at 181.

To the extent that Moses now raises a challenge to the constitutionality of Magistrate Judge King's adjudication of his case under 28 U.S.C. § 143, when he previously

argued under only 28 *U.S.C.* § 636(c), we find that Moses should have raised this additional claim in his prior appeal and cannot do so now. *See United States v. Adesida,* 129 F.3d 846, 849-50 (6th Cir. 1997) (citing *County of Suffolk* v. *Stone & Webster Eng 'g Corp.,* 106 F.3d 1112, 1117 (2d Cir.1997)).

The judgment of the district court is affirmed.

ENTERED BY ORDER OF THE COURT

/s/ (Signature Illegible) .
Clerk

APPENDIX B – ORDER OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF OHIO DECIDED AUGUST 1, 2005

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO

Case No. 2:99-CV-1357

AMBROSE MOSES, III,

Plaintiff,

v.

STERLING COMMERCE(AMERICA), INC., ET AL.

Defendants.

ORDER

This matter is before the Court upon Plaintiff's Motion To Chief Judge For Assignment Of Case To District Judge As Required By Article III Of The United States Constitution (Doc. 156). In support of that motion, Plaintiff contends that the fact that a district judge is not assigned to this case, in which he has consented to the jurisdiction of a magistrate judge, deprives him of rights and protections guaranteed to him by the United States Constitution.

Every argument raised by Plaintiff in support of his present motion was considered and rejected by the Court of Appeals. See Moses v. Sterling Commerce (America), Inc., No. 03-4172 (6th Cir. January 3, 2005).

Plaintiff has not attempted to identify a basis upon

which this Court might resolve those arguments differently. He is not entitled to the relief he seeks, and his motion for assignment of a district judge to this case (Doc. 156) is hereby DENIED.

IT IS SO ORDERED.

/s/ Sandra S. Beckwith
Sandra S. Beckwith, Chief Judge
United States District Court

APPENDIX C – JUDGMENT ENTRY AND ORDER OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF OHIO DECIDED MAY 5, 2005

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO

Case No. 2:99-CV-1357

AMBROSE MOSES, III,

Plaintiff,

v.

STERLING COMMERCE(AMERICA), INC., ET AL.

Defendants.

ORDER

On September 17, 2002, this Court granted defendants' motion for sanctions, awarding defendants $7,106.25 in connection with plaintiff's failure to comply with his discovery obligations and this Court's orders. Doc. No. 97. Plaintiff's refusal to participate in the discovery process persisted and, on July 1, 2003, the action was dismissed on that basis. Doc. Nos. 130, 131. The United States Court of Appeals for the Sixth Circuit affirmed this Court's judgment. *Moses* v. *Sterling Commerce (America) Inc.*, Case No. 03-4172 (6th Cir., January 3, 2005). This matter is now before the Court on defendants' renewed motion to correct the judgment, pursuant to F.R. Civ. P. 60(a), to expressly include the September 17, 2002, award of monetary sanctions against plaintiff.

Plaintiff objects to the motion, first, on the basis that the undersigned lacks jurisdiction to act in this case in "the absence of an Article III district judge." *Memorandum in Opposition,* at p.1. Doc. No. 148. This argument was soundly rejected by the Court of Appeals.

Plaintiff next contends that, because the Court lacked jurisdiction to stay consideration of defendants' motion during the pendency of the appeal, it *is* improper to now "circumvent the requirements of Civil Rule 60(a) and return the Defendants' motion to its docket." *Id.* With the issuance of the mandate of the court of appeals, however, the *case is* once again before this Court for consideration of any motion of the parties.

Finally, plaintiff contends that, with the entry of final judgment dismissing the case, the earlier award of sanctions "was dissolved, is unenforceable, and has no legal effect. ..." *Id.,* at p.2. Moreover, plaintiff argues, this Court "did not intend to impose both a dismissal and the $7,106.25." *Id.* Plaintiff is mistaken in his characterization of this Court's intention in dismissing the case.

Defendants' motion to alter and correct the judgment of July 1, 2003, to expressly include the award of sanctions is meritorious. Doing so will permit defendants to enforce the award, and plaintiff has offered no good reason why defendants should not be permitted to do so.

Accordingly, defendants' motion to alter or correct the judgment to expressly include the September 17, 2002, award of sanctions against plaintiff *is* **GRANTED.**

The Clerk shall enter **FINAL JUDGMENT DISMISSING** this case for failure to participate in the

discovery process and to comply with the orders of this Court and **AWARDING** to defendants and against plaintiff monetary sanctions under Rule 37 of the Federal Rules of Civil Procedure in the amount of $7,106.25.

/s/ Norah McCann King
Norah McCann King
United States Magistrate Judge

APPENDIX D – OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT DECIDED JANUARY 3, 2005

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

Docket No. 03-4172

AMBROSE MOSES, III,
Plaintiff-Appellant,

v.

STERLING COMMERCE(AMERICA), INC., ET AL.
Defendants-Appellees.

Before: MOORE and GIBBONS, Circuit Judges; EDMUNDS, District Judge.[1] JULIA SMITH GIBBONS, Circuit Judge.

Plaintiff-appellant Ambrose Moses, III, proceeding *pro se,* appeals from a judgment dismissing his complaint pursuant to Federal Rule of Civil Procedure 37(b)(2). Moses filed a complaint against defendants-appellees Sterling Commerce, Incorporated and five members of the company's management. He alleged that he was terminated because of his race and sex and because he engaged in protected conduct. The parties consented to have a magistrate judge exercise jurisdiction over the action pursuant to 28 U.S.C. § 636(c). After almost three years of discovery, the defendants filed a

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[1] . The Honorable Nancy G. Edmunds, United States District Judge for the Eastern District of Michigan, sitting by designation

motion to dismiss the case with prejudice based upon Moses's failure to comply with discovery requests and court orders. The magistrate judge granted the defendants' motion. Moses filed a timely appeal. For the following reasons, we affirm the judgment of the lower court.

Moses, an attorney, began working at Sterling Commerce as a Contract Specialist within its Department of Business Administration on December 29, 1996. The company fired him on December 17, 1997, for purported poor performance. Subsequently, Moses filed suit against Sterling Commerce and five of its management-level employees and officers. He alleged that Sterling Commerce discriminated against him on the basis of race and sex and retaliated against him "for seeking to protect [his] civil rights." Further, he alleged violations of 42 U.S.C. §§ 1981 and 1985 and numerous Ohio state law provisions.

The case was assigned to Judge Joseph Kinneary of the Southern District of Ohio. All parties consented to full magistrate judge jurisdiction over further proceedings. Judge Kinneary referred the case to Magistrate Judge Norah McCann King on April 10, 2000.

Discovery began in this case in February 2000. Over the next three years, Moses failed to adequately participate in the discovery process. He did not produce all the documents requested by Sterling Commerce or respond completely to its interrogatories, and he never finished his deposition.[2]

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[2]. Moses appeared for his deposition, but answered only a few questions about his name and address and then terminated the deposition. Sterling Commerce moved to compel Moses's deposition and asked for sanctions. Magistrate Judge King granted the defendants' motion to compel his deposition. However, she declined to impose sanctions on Moses, but noted that "the Court will not hesitate to impose sanctions

Sterling Commerce attempted to resolve these problems directly with Moses on at least five separate occasions between March 2000 and January 2001. After these communications did not produce the requested information, Sterling Commerce filed two motions to compel discovery. Included in both motions was Sterling Commerce's request for sanctions. On September 24,2001, Magistrate Judge King ordered Moses to produce certain documents and respond to certain interrogatories within fifteen days. The court also granted Sterling Commerce's request for sanctions, because "[p]laintiff persists in attempting to transform the litigation process into a game." Moses failed to meet the deadline set by this order, telling Magistrate Judge King in a status conference that he had not been able to comply with the order because he had been busy. Magistrate Judge King ordered Moses to produce the requested discovery by the close of business the following day. Thereafter, Moses submitted various documents to Sterling Commerce and responded to two interrogatories. Sterling Commerce did not find these discovery responses to be sufficient. In December 2001, it filed a motion to dismiss Moses's complaint for failure to participate in discovery and asked for sanctions. Magistrate Judge King denied this motion, because "[p]laintiff is, apparently, producing some discovery to defendants and an extension of the expert disclosure and dispositive motion filing dates will minimize the prejudice accruing to defendants by reason of plaintiffs recalcitrance." However, Magistrate Judge King did warn Moses that "failure to strictly comply with this order will result in the dismissal of the action." By 2003, Moses still had not provided all the discovery ordered by the court to be produced.

While the discovery process was ongoing, Moses

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against plaintiff should he again fail to participate in the discovery process."

twice tried to have Sterling Commerce's attorneys disqualified or sanctioned. On the first occasion, Moses filed a motion to disqualify the attorneys on the ground that the joint representation of the individual and corporate defendants constituted a conflict of interest. The court declined to disqualify the defendants' attorneys, because Moses had not identified any impropriety on the part of these attorneys. Later, Moses requested that Magistrate Judge King refer Sterling Commerce's attorneys for investigation and prosecution of a formal disciplinary proceeding. He argued that the attorneys had violated ethical rules by jointly representing the company and its management-level employees. Magistrate Judge King denied this request and observed that the court previously had rejected this argument.

Moses also tried to have the case removed from Magistrate Judge King's docket. On January 22, 2002, Moses filed two motions, one requesting that the case be referred to a mediation conference and the other asking for the case to be assigned to a district judge. Magistrate Judge King denied these motions. On February 25, 2003, Moses filed a motion with the Chief Judge of the Southern District of Ohio requesting that his case be assigned to a district judge. He argued that the "lack of a district court judge denie[d him] the rights and protections guaranteed to him by the United States Constitution . . . and is also inconsistent with the requirements of 28 U.S.C. § 636(c)" and that he was not receiving "fair, just, and impartial treatment from the magistrate judge." Chief Judge Walter Herbert Rice, while noting that the case was before the magistrate judge by full consent, nonetheless directed the clerk to assign the case to an Article III judge for "the sole and express purpose of ruling on the Plaintiff's Motion to withdraw the reference to the Magistrate Judge." The case was assigned to United States District Judge Edmund Sargus, Jr., who denied Moses's motion and returned the case to Magistrate Judge King. Judge Sargus ruled that there were no "extraordinary

circumstances" warranting that the case be removed from Magistrate Judge King's docket. Rather, he found that Moses's motion appeared to be "motivated by his dissatisfaction with certain rulings, which has led him to make conclusory, unsubstantiated claims of 'conspiracy' on the part of the Magistrate Judge and defense counsel."

After almost three years of receiving inadequate discovery responses, Sterling Commerce moved to dismiss Moses's suit with prejudice. On July 1, 2003, Magistrate Judge King granted Sterling Commerce's motion to dismiss the case, based upon Moses's "continued refusal to fully comply with this Court's discovery orders," the prejudice experienced by the defendants and the "time, money and effort" expended by them, and her conclusion that "a lesser sanction would be ineffectual under the circumstances of this case."

II.

On appeal, Moses raises a number of issues. He claims that Magistrate Judge King did not have the jurisdiction or authority to preside over this case, especially given that there was no district judge assigned to the case. He also asserts that Chief Judge Rice erred in assigning the case to Judge Sargus to evaluate Moses's motion to vacate the reference and that Judge Sargus erred in denying the motion. Further, Moses argues that Magistrate Judge King abused her discretion in dismissing the case with prejudice for discovery abuses and in refusing to disqualify defense attorneys or to refer misconduct allegations against defense attorneys for investigation. All of these arguments are without merit.

A.

Moses asserts that Magistrate Judge King did not have the authority to conduct any proceedings when there

was no district judge assigned to the case, deny his motion requesting that an Article III district judge be assigned to him, or impose sanctions.

The Federal Magistrates Act allows magistrate judges to preside over civil cases. It states in pertinent part: "Upon consent of the parties, a full-time United States magistrate judge . . . may conduct any or all proceedings in a jury or nonjury civil matter and order the entry of judgment in the case, when specially designated to exercise such jurisdiction . ..." 28 U.S.C. § 636(c)(1). This court has considered and rejected challenges to this statute based on the argument that it does not comport with Article III's mandates. *See Norris v. Schotten,* 146 F.3d 314, 325 (6th Cir. 1998); *Bell & Beckwith* v. *IRS,* 766 F.2d 910, 912 (6th Cir. 1985); *K. M.C. Co. v. Irving Trust Co.,* 757 F.2d 752, 755 (6th Cir. 1985).

In this case, it is undisputed that both Moses and Sterling Commerce consented to the reference to a magistrate judge. Moses himself signed a form that stated, "All further proceedings in this action, including trial and entry of a final judgment, may be conducted by a United States Magistrate Judge." Thus, having given his consent to a magistrate judge hearing his case, Moses cannot now contest Magistrate Judge King's authority to impose sanctions, rule on motions, or render a final judgment. The plain language of § 636(c) allows the magistrate judge to "conduct *any or all* proceedings in a jury or nonjury civil matter and order the entry of judgment." (emphasis added). A full referral to a magistrate judge allows the magistrate judge to oversee litigation in the same manner as a district judge would. In fact, a "§ 636(c)(1)-referral gives the magistrate judge full authority over dispositive motions, conduct of trial, and entry of final judgment, all without district court review." *Roell v. Withrow,* 538 U.S. 580, 585 (2003). The "magistrate judge may exercise plenary jurisdiction." *Vitols v. Citizens Banking Co.,* 984 F.2d 168, 169 (6th Cir. 1993). It

was therefore appropriate for Magistrate Judge King to rule on Moses's request to vacate the reference, dismiss his action with prejudice, impose sanctions, and decline to disqualify the defense attorneys. Moses's arguments to the contrary are meritless.

For these same reasons, it was not error that no district judge was assigned to this case after the retirement of Judge Kinneary. By consenting to having his case heard by the magistrate judge, Moses waived his constitutional right to an Article III judge. *See Dixon v. Ylst,* 990 F.2d 478, 479-80 (9th Cir. 1 993) ("A party to a federal civil case has, subject to some exceptions, a constitutional right to proceed before an Article III judge. This right can be waived, allowing parties to consent to trial before a magistrate judge.") (citations omitted). Further, as we have observed, "[a]lthough not a 'district judge,' a magistrate judge exercises the same jurisdiction as a district judge where there is a designation pursuant to § 636(c)." *Vitols,* 984 F.2d at 169. Moses's arguments that he was denied constitutional protections and that Magistrate Judge King acted without authority when there was not a district judge assigned to the case are simply incorrect.

Moses also suggests that his consent to the referral was not freely given "because it was heavily influenced and driven by his need for avoiding the endurance of an unreasonable delay with Senior Judge Kinneary." Moses never argued in the lower court that his consent to magistrate judge jurisdiction was not freely given. Thus, Moses has waived his opportunity to contest the voluntariness of his consent, because this court, "subject to limited exceptions, ... will not consider issues not presented to the district court but raised for the first time on appeal." *Preferred RX, Inc. v. Am. Prescription Plan, Inc.,* 46 F.3d 535, 549 (6th Cir. 1995).

Even if Moses had not waived his right to present this argument, his contention that his consent was not freely given is not credible. Waiver of a right to have a case heard by an Article III judge must be evidenced by "voluntary, knowing, and intelligent action." *Norris*, 146 F.3d at 326. Moses took this action when he signed the consent form, which clearly stated that all proceedings would be conducted by a magistrate judge. Further, Moses is a licensed attorney, who likely knew the consequences of signing that document. The fact that Moses believed he could get relief faster under a magistrate judge than with Judge Kinneary does not mean that his consent was given involuntarily. "Access to district judges in the current judicial system is not so restricted that adjudication of cases by magistrates is a compelled alternative." *Pacemaker Diagnostic Clinic of Am., Inc.* v. *Instromedix, Inc.*, 725 F.2d 537, 543 (9th Cir. 1984). Moses points to nothing in the record nor does the record reveal any other facts to support his contention that his consent to the magistrate judge referral was anything but freely given.

B.

Next, Moses argues that Chief Judge Rice erred in assigning his motion to vacate the reference to another district judge for the limited purpose of ruling on that motion. This contention is unavailing. As previously discussed, Moses and Sterling Commerce consented to a full referral to a magistrate judge under § 636(c). At that point, the magistrate judge assumed the duties of the district judge and had the authority to rule on "any or all proceedings." 28 U.S.C. § 636(c)(1). The district court thereafter could only entertain motions to vacate the reference to the magistrate judge. *See id.* § 636(c)(4) ("The court may, for good cause shown on its own motion, or under extraordinary circumstances shown by any party, vacate a reference of a civil matter to a magistrate judge under this subsection."); *Manion v. Am. Airlines, Inc.*, 251 F. Supp. 2d 171, 175 (D.D.C. 2003) (noting that "the District Court's 'supervisory

authority' over actions referred for all purposes to a Magistrate Judge is limited to consideration of motions to vacate the referral").

Further, Judge Sargus, in ruling on this motion, did not err in denying it. A motion to vacate the reference to a magistrate judge should only be granted upon motion of a party if that party shows "extraordinary circumstances." 28 U.S.C. § 636(c)(4). Moses failed to demonstrate extraordinary circumstances. Instead, he attacked the integrity of the proceedings, the authority of the magistrate judge, and stated that the "magistrate judge has shown a prejudice and bias against Moses." These conclusory allegations demonstrate a distaste for how his case was being resolved by the magistrate judge. A motion to vacate the reference cannot stand on these grounds. *See Milhous v. Metro. Gov't of Nashville & Davidson County*, No. 99-5685, 2000 WI, 876396, at *1 (6th Cir. June 21, 2000) ("It is equally clear that no 'extraordinary circumstances' were shown here but, rather, the plaintiff simply was displeased with the magistrate's rulings on the motions to dismiss.").

C.

Moses also contests Magistrate Judge King's dismissal of his case. This court reviews the dismissal of an action for failure to cooperate in discovery for an abuse of discretion. *See Nat'l Hockey League* v. *Metro. Hockey Club, Inc.*, 427 U.S. 639, 642 (1976); *Harmon v. CSX Transp., Inc.*, 110 F.3d 364, 366 (6th Cir. 1997).

Federal Rule of Civil Procedure 37(b)(2) authorizes a court to dismiss a case when a party has failed to obey an order regarding discovery. This court considers four factors when reviewing the dismissal of a complaint: (1) whether the party's failure to cooperate in discovery is due to willfulness, bad faith, or fault; (2) whether the adversary was prejudiced by the dismissed party's failure to cooperate in discovery; (3) whether the dismissed party was warned that failure to

cooperate could lead to dismissal; and (4) whether less drastic sanctions were imposed or considered before dismissal was ordered. *Harmon,* 110 F.3d at 366-67.

The record clearly reflects that Moses's failure to cooperate in discovery was willful. Moses never completed his deposition, although he was ordered to do so by the court. Moses also failed to produce certain documents and answer certain interrogatories despite being ordered to do so several times by Magistrate Judge King. In fact, by 2003, Moses still had not complied with orders issued by the court in September 2001 and September 2002. Moses's refusal to be deposed and his consistent failure to comply with court orders and defense requests to produce discovery materials support the conclusion that his conduct was willful and in bad faith. There was no valid reason for him not to provide the information requested after being ordered to do so by the court.

The second *Harmon* factor is whether the adversary was prejudiced by the party's failure to participate in discovery. Moses's actions likely cost Sterling Commerce both time and money; the defendants had to file two motions to compel and two motions to dismiss based upon Moses's failure to cooperate. Defense attorneys also sent numerous letters trying to obtain this information. Further, Moses failed to respond to discovery requests for almost three years, unnecessarily delaying resolution of the case. As noted by the *Harmon* court in upholding dismissal of a case based on a failure to cooperate in discovery, "Not only had [the company] been unable to secure the information requested, but it was also required to waste time, money, and effort in pursuit of cooperation which [the adversary] was legally obligated to provide." *Harmon,* 110 F.3d at 368. Similarly, Moses's failure to participate in discovery prejudiced Sterling Commerce because, not only did it never receive the requested discovery, it also had to

expend considerable effort in trying to secure his cooperation.

The third *Harmon* factor is whether the party was warned that failure to cooperate could lead to dismissal. In a September 2002 order, Magistrate Judge King specifically stated that "plaintiff is put on notice that his failure to strictly comply with this order will result in the dismissal of the action." Thus, this factor is satisfied. The final *Harmon* factor is whether less drastic sanctions were imposed or considered. Magistrate Judge King did in fact impose less drastic sanctions in previous orders. First, in 2000, she warned Moses that "any future misconduct will be sanctioned." Next, in 2001, Magistrate Judge King granted defendants' motions for sanctions. In 2002, she warned Moses that his failure to cooperate would result in dismissal of his case. At that time, she denied defendants' motion to dismiss the case for failure to cooperate in discovery. Thus, Magistrate Judge King imposed warnings and monetary sanctions, none of which compelled Moses to participate in discovery, before dismissing his action.

The *Harmon* factors weighed strongly in favor of dismissing Moses's case pursuant to Rule 37(b)(2). Given Moses's willful failure to cooperate over a three-year period, Magistrate Judge King did not abuse her discretion in dismissing his case.

D.

Finally, Moses claims that Magistrate Judge King's failure to disqualify the defense attorneys
or refer allegations of misconduct for investigation was error. A district court's refusal to disqualify defense counsel is reviewed for an abuse of discretion. *See Petrovic* v. *Amoco Oil Co.*, 200 F.3d 1140, 1154 (8th Cir. 1 999); *In re Dresser Indus., Inc.*, 972 F.2d 540, 546 (5th Cir. 1992). Courts must be vigilant in reviewing motions to disqualify counsel as "the ability to deny one's opponent the services of capable

counsel[ ] is a potent weapon," *Manning v. Waring, Cox, James, Sklar & Allen,* 849 F.2d 222, 224 (6th Cir. 1988), that can be "misused as a technique of harassment." *Kitchen* v. *Aristech Chem.,* 769 F. Supp. 254, 257 (S.D. Ohio 1991) (citations omitted).

Magistrate Judge King did not abuse her discretion in denying Moses's motion to disqualify defense attorneys or in refusing to follow his suggestion that the defense attorneys be referred for investigation. A court should only disqualify an attorney "when there is 'a reasonable possibility that some specifically identifiable impropriety' actually occurred." *Id.* (quoting *United States v. Kitchin,*592 F.2d 900, 903 (5th Cir. 1979)). Magistrate Judge King correctly observed that Moses "has neither alleged nor established any impropriety on the part of defense counsel that would warrant disqualification." The record confirms that Moses's assertions of impropriety on the part of defense attorneys were frivolous, and thus Magistrate Judge King did not abuse her discretion in refusing to disqualify Sterling Commerce's attorneys or refer them to disciplinary proceedings.

For the foregoing reasons, we affirm the judgment of the lower court.

APPENDIX E – JUDGMENT ENTRY, OPINION, AND ORDER OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF OHIO DECIDED JULY 1, 2003

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO

Case No. 2:99-CV-1357

AMBROSE MOSES, III,

Plaintiff,

v.

STERLING COMMERCE(AMERICA), INC., ET AL.

Defendants.

OPINION AND ORDER

Plaintiff brings this action for race and sex discrimination and retaliation under Title VII of the Civil Rights Act of 1964, 42 U.S.C. §2000e-5, as amended, and 42 U.S.C. §1981 as well as conspiracy claims under 42 U.S.C. §§1985, 1986. Plaintiff also asserts supplemental state law claims under O.R.C. §4112.02, .99, with additional common law claims of wrongful discharge, defamation, negligence, breach of contract, promissory estoppel, negligent and intentional infliction of emotional distress, civil conspiracy, and fraud. With the consent of the parties, 28 U.S.C. §636(c), this matter is before the Court on defendants' motion to dismiss.

I. Background

Plaintiff names as defendants Sterling Commerce (America), Inc. (hereinafter "Sterling Commerce"), his former employer; Paul L.H. Olson, President of Sterling Commerce; Thomas Williams, Vice President of Finance and Administration; Terry Thomas, Vice President of Finance;
Phyllis Hohe, Director of Business Administration; and Melissa Coleman, Manager of Contracts.

On September 16, 1996, plaintiff submitted his resume' and cover letter to Sterling Commerce in response to its advertisement seeking a Contract Specialist. *First Amended Complaint,* ¶¶ 11-12. During his interview with Sterling Commerce on November 7, 1996, plaintiff was allegedly informed by the Human Resources Advisor that the Contract Specialist position had been upgraded to a Senior Contract Specialist because defendant Hohe wished to fill the position with an individual possessing a law degree. *Id.*, at 14. Plaintiff alleges that he was told that he would be considered for the Senior Contract Specialist position because he was a licensed attorney. *Id.* Plaintiff was later interviewed by Hohe, who, plaintiff alleges, informed him that the business environment and growth of Sterling Commerce would provide plaintiff with many opportunities for advancement and exposure to significant responsibilities. *Id.*, at 18. However, plaintiff alleges that he was advised that Hohe did not offer him the position of Senior Contract Specialist because she was looking for an individual with more experience in the area of intellectual property *Id.*, at ¶ 19. On December 18, 1996, plaintiff was offered the position of Contract Specialist. *Id.* Plaintiff accepted that offer of employment on December 23, 1996 and began working on December 29, 1996. *Id.*, at 21, 24.

Plaintiff contends that he was the only male

employee in the Department of Business Administration and that, beginning in February 1997, Hohe became hostile toward him and began treating him differently than the female employees under her supervision. *Id.*, at ¶¶ 25-29. Plaintiff alleges that Hohe would assign him a project, then re-assign the project to female employees when it grew in significance. *Id.*, at ¶ 31. Plaintiff also contends that Hohe failed to provide him with the same training that she provided to female employees. Id., at 32. Hohe also, allegedly, unreasonably increased plaintiffs workload and unfairly criticized and altered his work product, while not doing so to female employees. *Id.*, at 33, 35. Plaintiff alleges that Hohe addressed him in a condescending and disrespectful tone, but did not do so in regard to her female employees. *Id.*, at ¶ 36. Plaintiff further alleges that, in June 1997, Sterling Commerce and Hohe hired Coleman, a white female, as Manager of Contracts despite her lack of experience in the area of intellectual property and despite the fact that the job posting had been advertised as a Contract Specialist position. *Id.*, at ¶ 44.

On October 1, 1997, plaintiff submitted an Employee Interim Self-Evaluation to Hohe in which plaintiff indicated that he had achieved all of his assignments, goals, and standards. *Id.*, at 51. The self-evaluation also indicated, in the relevant section, that Hohe could assist him by alleviating inequities within the Department of Business Administration. *Id.*, at 52. On October 6, 1997, Hohe and Coleman disciplined plaintiff with a "specifically created review period." *Id.*, at 54. Coleman further disciplined plaintiff by placing him on probation. *Id.*, at 58. Plaintiff alleges that, Coleman failed to provide him the necessary training and support he needed to succeed in his duties. *Id.*, at l(64.

On approximately October 22, 1997, plaintiff sought

the assistance of defendants Olson and Williams. *Id.*, at 78. Plaintiff alleges that, when he asked to be transferred to another department, Olson and Williams denied the request. *Id.*, at ¶ 82. In fact, the Vice President of Human Resources informed plaintiff that his options were to either agree to a mutual separation or return to his position in the Department of Business Administration. *Id.*, at ¶ 83.

Plaintiff further alleges that Sterling Commerce terminated his employment on December 19, 1997, after hiring a white female as a Contract Specialist on December 15, 1997. *Id.*, at ¶ 68-70.

II. Discussion

On October 18, 2002, defendants filed a motion to dismiss, alleging that plaintiff has failed to fully comply with this Court's orders, and has otherwise persisted in his failure to cooperate in the discovery process. Rule 37(b)(2) of the Federal Rules of Civil Procedure provides, in relevant part, "If a party ... fails to obey an order to provide or permit discovery ... the court in which the action is pending may make such orders in regard to the failure as are just, [including] [a]n order ... dismissing the action ...." Fed. R. Civ. P. 37(b)(2)(C). Additionally, Rule 41 provides, "For failure of the plaintiff to prosecute or to comply with these rules or any order of court, a defendant may move for dismissal of an action...." Fed. R. Civ. P. 41(b). In applying either Rule 37(b)(2) or Rule 41, the Court is to consider four factors:

> (1) whether the party's failure is due to willfulness, bad faith, or fault;
> (2) whether the adversary was prejudiced by the dismissed party's conduct;
> (3) whether the dismissed

> party was warned that failure to cooperate could lead to dismissal; and
> (4) whether less drastic sanctions were imposed or considered before dismissal was ordered.
> (5)

Harmon v. *CSX Transp. Inc.*, 110 F.3d 364, 366-67 (6th Cir. 1997).

A. Willfulness, Bad Faith, or Fault

Plaintiff bears the burden of showing that his failure to comply with defendants' discovery requests, as well as this Court's orders, was due to inability and not willfulness or bad faith. *See United States* v. *Reyes*, 458 F.3d 451, 458 (6th Cir. 2002). In this case, plaintiff has made no such showing, and in fact, the record reflects otherwise.

Defendants scheduled a deposition of plaintiff for March 30, 2000. *See Exhibit 6,* attached to *Defendants ' Motion for Sanctions and to Compel the Deposition of Plaintiff.* Prior to March 30, plaintiff sent defendants a letter requesting that his deposition be postponed so that he could have additional time to review defendants' discovery responses. *Exhibit 13,* attached to *Defendants' Motion for Sanctions and to Compel the Deposition of Plaintiff* Defendants, however, denied plaintiff's request. *Exhibit 15,* attached to *Defendants' Motion for Sanctions and to Compel the Deposition of Plaintiff.* On March 30, plaintiff arrived for his deposition. Plaintiff responded to several preliminary questions regarding the deposition notice, his name and address, and the length of time he had spent at his current address. *Exhibit A,* attached to *Marla Clark Affidavit,* attached as Exhibit 1 to *Defendants '*

Motion for Sanctions and to Compel the Deposition of Plaintiff. Thereafter, plaintiff refused to answer any questions and unilaterally terminated the deposition. *Id.* In response to defendants' motion to compel, this Court stated, "[P]laintiff was not entitled to delay his deposition on the ground that he had not had an opportunity to examine the discovery that he had requested from defendants." *Opinion and Order,* at p. 13 (November 16, 2000). While this Court ultimately refused to grant defendants' request for sanctions, plaintiff was advised that "the Court will not hesitate to impose sanctions against plaintiff should he again fail to participate fully in the discovery process." *Id,* at p. 14.

On February 15, 2000, defendants served their first set of Interrogatories and their first set of Requests for Production of Documents, requesting information related to plaintiff's claim of damages. *Exhibits A and B,* attached to *Defendants' Motion to Compel.* Plaintiff did not fully respond to these requests, but indicated that he would provided a "more detailed statement of damages" once he obtained "sufficient discovery from defendants[,]" and that he would "make [other] documents available for inspection simultaneously with defendants' complete production of documents." *Exhibit E,* attached to *Defendants ' Motion to Compel.* In response to defendants' motion to compel, this Court, once again, noted, "The rules governing discovery do not permit one party to condition his discovery obligations on the other party's discovery responses." *Opinion and Order,* at p. 6 (September 24, 2001). This Court granted defendants' motion to compel and ordered plaintiff to respond within fifteen (15) days of the order. *Id.,* at p. 7. Additionally, this Court granted defendants' request for sanctions, noting, "Plaintiff persists in attempting to transform the litigation process into a game." *Id.,* at p.10.

On December 10, 2001, defendants moved to

dismiss this action, or in the alternative issue a preclusion order with monetary sanctions, referring to continued discovery abuses on the part of plaintiff. Defendants argued that, despite this Court's September 24, 2001 order, plaintiff had failed to: (1) produce the W-2 forms and income tax returns requested, (2) provide the calculation of damages sought by him, and (3) produce information relating to his work history. *Lori A. Clark Affidavit,* attached as Exhibit A to *Defendants' Motion (1) to Dismiss...or in the Alternative, Exclude Plaintiff's Damages Claims, or in the Alternative, Compel Plaintiff's Compliance with Court Order....* The Court, however, refused to dismiss the action at that time or to issue a preclusion order. *Opinion and Order,* at p. 10 (September 17, 2002). Instead, the Court gave plaintiff an additional ten (10) days to produce the requested discovery. *Id.* The Court noted, however, that "[t]here will be no extension of this date and the Court will accept no excuses for any failure on plaintiff's part to strictly comply with this order." *Id.* Plaintiff was also put on notice that "his failure to strictly comply with this order will result in the dismissal of the action." *Id.* (emphasis added).

On September 24, 2002, plaintiff filed a notice of appeal with the United States Court of Appeals for the Sixth Circuit in connection with this Court's award of sanctions. Plaintiff also filed a motion for stay of the proceedings pending resolution of his appeal. On December 17, 2002, the United States Court of Appeals for the Sixth Circuit dismissed plaintiffs appeal. Subsequently, this Court denied as moot plaintiffs request for a stay. *Order* (January 29, 2003). After plaintiff's motion for a stay was denied, defendants filed a status report with this Court indicating that plaintiff had yet to comply with the Court's order to produce W-2 forms, a calculation of damages, and information relating to work history.

Plaintiff also filed a status report. However, plaintiff does not explain why he has failed to comply with this Court's discovery order. Instead, plaintiff again complains that defendants have failed to comply with his own discovery requests. This series of events demonstrates a pattern of continued refusal to fully comply with this Court's discovery orders. Moreover, it is clear that plaintiffs actions were willful.

B. Warning

Additionally, a pre-dismissal warning for failure to comply with a court's order is pivotal to a determination of willfulness. *Maldonado v. Thomas M. Cooley Law School,* (slip copy), 2003 WL 21130032, *3 (6th Cir. 2003)(citing *Harris v. Callwood,* 844 F.2d 1254, 1256 (6th Cir. 1988)). As was discussed *supra,* plaintiff has been repeatedly warned that his failure to comply could lead to the imposition of sanctions. In fact, plaintiff was specifically warned that "failure to strictly comply with [the Court's] order will result in the dismissal of the action." *Opinion and Order,* at p. 10 (September 17, 2002).

C. Prejudice

There can be no doubt that defendants have been prejudiced by plaintiffs repeated failure to cooperate in discovery. Defendants have expended time, money and effort in pursuit of discovery that plaintiff was legally obligated to provide. *Harmon,* 110 F.3d at 368. Defendants assert that they have been unable to complete discovery due to plaintiffs failure cooperate in the litigation that he initiated. *See Defendants' Motion for Extension of Summary Judgment deadline. See also Defendants ' Motion for Extension of Discovery Cut-Off and Summary Judgment Deadline.*

D. Alternate Sanctions

Finally, this Court concludes that a lesser sanction would be ineffectual under the circumstances of this case. This Court has repeatedly warned plaintiff that his failure to cooperate would lead to the imposition of sanctions, and the Court has previously imposed monetary sanctions for plaintiff's failure to cooperate in the discovery process. Yet plaintiff's unwillingness to comply with this Court's orders persists. Therefore, considering all the factors, this Court concludes that dismissal is an appropriate sanction.

WHEREUPON, in light of the foregoing discussion, this Court concludes that defendants' motion to dismiss is meritorious and it is therefore GRANTED.

The Clerk shall enter **FINAL JUDGMENT** in this action.

/s/ Norah McCann King
Norah McCann King
United States Magistrate Judge

Dated July 1, 2003

APPENDIX F – JUDGMENT ENTRY AND ORDER OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF OHIO DECIDED APRIL 4, 2003

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO

Case No. 2:99-CV-1357

AMBROSE MOSES, III,

Plaintiff,

v.

STERLING COMMERCE(AMERICA), INC., ET AL.

Defendants.

OPINION AND ORDER

This matter was assigned, by random draw, to the undersigned on March 31, 2003 for a limited purpose pursuant to an Order of Chief Judge Walter H. Rice. The Chief Judge has directed that this Court consider the Plaintiff's Motion to Vacate an Order of Consent to disposition of this case by Chief Magistrate Judge Norah McCann King.

This case was originally assigned to Judge Joseph P. Kinneary of this Court. On April 10, 2000, the parties consented to disposition of the case by Magistrate Judge King. (Doc. #14). In light of the consent, no district judge was assigned to this case. In his February 25, 2003 motion to the Chief Judge, Plaintiff, who is an attorney proceeding *pro se*, argues that "[t]he lack of a district

court judge in this case is ... inconsistent with the requirements of 28 U.S.C. §636(c) which mandates that the district court retain supervisory jurisdiction and authorizes the district judge to vacate a reference on its own motion." *(Plaintiffs Motion at* 2).

In a separate motion filed on March 6, 2003, Plaintiff argues that "extraordinary circumstances" warrant vacating the Order of consent to disposition by the Magistrate Judge.[3] In his motion, Plaintiff makes numerous allegations of conspiracy on the part of Defendants to deprive him of his civil rights. Plaintiff argues that the Magistrate Judge has aided in the conspiracy, presumably by rulings which Plaintiff perceives as disadvantageous to his position. According to Plaintiff, the Magistrate Judge has "shown a prejudice and bias against [Plaintiff] and in favor of the defendants and defense counsel." *(Motion* at 22). Plaintiff contends that, as a result, the integrity of the proceedings has been tainted and thus, extraordinary circumstances exist to set aside the consent order.

28 U.S.C. § 636(c)(1) provides, in relevant part:

> Upon the consent of the parties, a full-time United States magistrate ... may conduct any or all proceedings in a jury or nonjury civil matter and order the entry of judgment in the case, when specially designated to exercise such jurisdiction by the district court or courts he serves.

After consent is given, "[t]here is no absolute right, in a

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[3] . Plaintiff also requests an evidentiary hearing on the motion. The Court concludes that a hearing is unnecessary. As such, Plaintiff's request is denied.

civil case, to withdraw consent to trial and other proceedings before a magistrate judge." *Dixon v. Ylst,* 990 F.2d 478, 480 (9th Cir. 1[4])93), citing Carter *v. Sea-Land Servs.,* 816 F.2d 1018, 1020 (5th Cir. 1987); *Fellman v. Fireman's Fund Ins. Co.,* 735 F.2d 55, 58 (2nd Cir. 1984). The statute does provide, however, for withdrawal upon a showing of "extraordinary circumstances" by any party. 28 U.S.C. § 636(06).

After a thorough review of Plaintiff's motion, the Court does not find "extraordinary circumstances" so as to warrant setting aside the parties' consent to disposition of this case by the Magistrate *Judge.* It is clear that Plaintiff's motion is motivated by his dissatisfaction with certain rulings, which has led him to make conclusory, unsubstantiated claims of "conspiracy" on the part of the Magistrate Judge and defense counsel. These claims do not constitute an extraordinary circumstance that would warrant setting aside the order of consent under § 636(c)(6). Furthermore, contrary to Plaintiff's contention, when the parties consent to disposition by the Magistrate Judge, an Article 111 judge is no longer assigned to the case. 28 § 636(c)(1).

In sum, the fact that this case lacks an Article III judge is of no significance in light of the fact that the parties consented to disposition by Magistrate Judge King, as reflected by the April 10, 2000 Order of Judge Kinneary, and in light of this Court's finding that extraordinary circumstances to set aside the consent order are not present. Thus, Plaintiff's Motion (Doc. #118) is **DENIED.** In accordance with the directive of Chief Judge Rice, this matter is hereby returned to Chief Magistrate Judge King for further disposition.

IT IS SO ORDERED.

/s/ Edmund A. Sargus, Jr.

EDMUND A. SARGUS, JR.
UNITED STATES DISTRICT JUDGE

Dated April 3, 2003